

WILMER, CUTLER & PICKERING

2445 M STREET, N.W.

WASHINGTON, D.C. 20037-1474

TELEPHONE (202) 663-6000

FACSIMILE (202) 663-6363

DAVID G. GRAY
DIRECT LINE (202) 663-6299
INTERNET DGRAY@WILMER.COM

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Federal Communications Commission
Office of Secretary

May 6, 1997

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BALTIMORE, MD 21201
TELEPHONE (410) 986-2800
FACSIMILE (410) 986-2828

4 CARLTON GARDENS
LONDON SW1Y 5AA
TELEPHONE 011 (44) 171 872-1000
FACSIMILE 011 (44) 171 839-3537

RUE DE LA LOI 15 WETSTRAAT
8-1040 BRUSSELS
TELEPHONE 011 (32) 285-4900
FACSIMILE 011 (32) 285-4949

FRIEDRICHSTRASSE 95
D-10117 BERLIN
TELEPHONE 011 (49) 30 2022-6400
FACSIMILE 011 (49) 30 2022-6500

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, NW
Washington, D.C. 20554

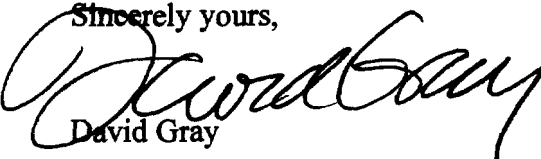
Re: MM Docket No. 95-83
RM-8634
Littlefield, Wolfforth and Tahoka, Texas

Dear Sir:

On behalf of El Paso and Lubbock, Inc. ("EPL"), enclosed for filing with the Commission are an original and four copies of EPL's Opposition to the Petition for Partial Reconsideration filed by 21st Century Radio Ventures, Inc., in the above-referenced matter.

If there are any questions concerning the above matter, please communicate directly with the undersigned.

Sincerely yours,


David Gray

Enclosures

cc: John A. Karousos, Chief, Allocations Branch, FCC
James L. Primm
Richard Zaragoza, Esq.
Christopher D. Imlay, Esq.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of Secretary

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 95-83
Table of Allotments,)	RM-8634
FM Broadcast Stations)	
(Littlefield, Wolfforth and)	
Tahoka, Texas))	

To: Chief, Allocations Branch

OPPOSITION TO PETITION FOR PARTIAL RECONSIDERATION

El Paso and Lubbock, Inc. ("EPL"), the licensee of KLLL(AM) and KLLL-FM, Lubbock, Texas,^{1/} hereby opposes the Petition for Partial Reconsideration ("Petition") filed by 21st Century Radio Ventures, Inc. ("Petitioner"). The Petition proposes for the first time an amendment to the FM table of allotments that was neither included in the Notice of Proposed Rulemaking for this proceeding (the "NPRM") nor addressed by the comments of Petitioner (or any other party to this proceeding). The Petition should be denied because its counterproposal is untimely and circumvents well-established Commission procedures.

Background

Petitioner initiated this proceeding by filing a petition to amend the FM table of

^{1/} Lee W. Shubert, Trustee, formerly the licensee of KLLL(AM) and KLLL-FM, filed previous pleadings on their behalf in this proceeding.

Allotments.^{2/} In response, the Commission adopted the NPRM seeking comments on two alternative amendments proposed by Petitioner: 1) the reallocation of Channel 283C3 from Littlefield to Wolfforth and the deletion of Channel 237A, and 2) the reallocation of Channel 283C3 from Littlefield to Wolfforth and the substitution of Channel 278A for Channel 237A. The NPRM stated that it would delete Channel 237A if there was no expression of interest in the channel. However, it proposed to substitute Channel 278A for Channel 237A “[i]f interest is expressed to retain Channel 237A and petitioner’s proposal is adopted.”^{3/}

Petitioner filed comments in support of the reallocation, while EPL’s predecessor filed comments in opposition. Albert Benavides also filed an application for a construction permit to build a station on undeleted Channel 237A. This application has been held in abeyance pending a final determination in this proceeding.^{4/}

On March 27, 1997, the Allocations Branch of the Mass Media Bureau issued a Report and Order in which it found that Petitioner’s proposal “would not serve the public interest.” It also concluded that “[b]ased on our decision, we need not delete Channel 237A, Tahoka, Texas, or in the alternative substitute Channel 278A for Channel 237A at Tahoka to accommodate 21st Century’s reallocation proposal.”^{5/}

^{2/} Petitioner also filed a modification of its Construction Permit to specify Wolfforth as its community of license.

^{3/} Notice of Proposed Rulemaking, 10 FCC Rcd 6598, 6599 (1995) (emphasis supplied).

^{4/} Letter from Chief, Audio Services Division, to Christopher D. Imlay, Esq., File No. BPH-950824MC, November 13, 1996.

^{5/} Report and Order, MM Docket No. 95-83 at ¶ 9 (rel. Mar. 21, 1997) [hereinafter (continued...)]

Petitioner does not challenge the Commission's decision with respect to the denial of its proposed channel reallocation. Instead, it requests that the Commission simply substitute Channel 278A for Channel 237A. As justification for this channel substitution, Petitioner presents an entirely new set of facts for the Commission's consideration. It states that it intends to file an application to change the transmitter site for its radio station KAIQ(FM), and that the new, unidentified site is short-spaced to Channel 237A.^{5/}

Argument

The Petition should be denied because it is an untimely counterproposal seeking to substitute Channel 278A for Channel 237A. Having failed to achieve its desired allotment scheme, Petitioner is now asking the Commission to consider an entirely different amendment to the FM table of allotments. Neither its prior petition for rulemaking, the NPRM, nor Petitioner's comments in the proceeding even proposed the channel substitution now sought by Petitioner. As indicated above, the two alternative amendments identified by the NPRM were: 1) the reallocation of Channel 283C3 and the deletion of Channel 237A, or 2) the reallocation of Channel 283C3 and the substitution of Channel 237A. The NPRM leaves no doubt that any channel substitution was to be contingent on an expression of interest in Channel 237A and the reallocation of Channel 283C3, and Petitioner never challenged that proposal. Thus, the substitution of Channel 278A for Channel 237A, standing alone, was not previously at issue in

^{5/} (...continued)
"Report and Order"].

^{6/} Oddly, Petitioner does not identify the location of the new transmitter site but is able to specify the exact number of people that KAIQ(FM) will serve from this site. Petition at 6.

this rule making.

As the Commission's rules and the NPRM itself make clear, counterproposals may only be considered if raised in initial comments. 47 C.F.R. § 1.420(d) and Appendix to the NPRM. The Commission has repeatedly rejected similar attempts to introduce counterproposals in petitions for reconsideration.^{7/} Moreover, the Petition should be denied because it introduces new facts into the proceeding without any attempt to satisfy the requirements of Section 1.429(b) of the Commission's Rule.^{8/}

A grant of this Petition would clearly be contrary to "the orderly process for authorization of broadcast service." Application of Idaho Broadcasting Consortium, Inc., 11 FCC Rcd 5264 (1996).^{9/} As the D.C. Circuit has stated:

We cannot allow [a party] to sit back and hope that a decision will be in its favor,

^{7/} See Churubusco, Huntington, Roanoke and South Whitley, Indiana, 4 FCC Rcd 5045 (PRD 1989), aff'd, 5 FCC Rcd 916 (1990); Scranton and Surfside Beach, South Carolina, 4 FCC Rcd 2366, 2367 (PRD 1989) (permitting an untimely counterproposal "would effectively eviscerate Section 1.420 and provide an incentive for the filing of late counterproposals in the guise of petitions for reconsideration."); Keokuk, Iowa, 4 FCC Rcd 7467 (PRD 1989); Marietta, Ohio and Ravenswood, West Virginia, 3 FCC Rcd 360 (PRD 1988).

^{8/} Section 1.429 governs petitions for reconsideration in notice and comment rule making proceedings. See Scranton and Surfside Beach, South Carolina, 4 FCC Rcd at 2367. The Petition fails to show that the new facts relate to events that have occurred or circumstances that have changed since the last opportunity to present them to the Commission. 47 C.F.R. § 1.429(b)(1). Nor does it allege that the new facts were unknown to Petitioner until after its last opportunity to present them to the Commission and that Petitioner could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity. Id. § 1.429(b)(2). Finally, the Petition does not show why consideration of the facts relied on is required in the public interest. Id. § 1.429(b)(3).

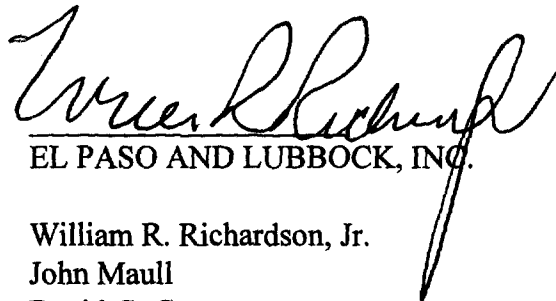
^{9/} Keokuk, Iowa, 4 FCC Rcd at 7467 (finding that it is not in the public interest to consider a counterproposal raised in a petition for reconsideration); Scranton and Surfside Beach, South Carolina, 4 FCC Rcd at 2367 (same).

and then, when it isn't, to parry with an offer of new evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were followed.

Colorado Radio Corp. v. FCC, 118 F.2d 24, 26 (D.C. Cir. 1941).^{10/} Petitioner has had ample opportunity to propose amendments to the FM table of Allotments. Now that the Commission has rejected its preferred allotment scheme, Petitioner should not be permitted to have another bite of the apple.

For the foregoing reasons, the Petition for Partial Reconsideration should be denied.

Respectfully submitted,



EL PASO AND LUBBOCK, INC.

William R. Richardson, Jr.
John Maull
David G. Gray

Wilmer, Cutler & Pickering
2445 M Street, NW
Washington, D.C. 20037
202-663-6000

Its Attorneys

May 6, 1997

^{10/} See also Applications of Carolyn S. Hagedorn, 11 FCC Rcd 1695, 1696 (1996) (In refusing to consider new facts in a petition for reconsideration, the Commission stated "Commission policy . . . encourages applicants and others to provide complete information at an early stage Our processes operate inefficiently at best, when, as here, facts are presented piecemeal.").

CERTIFICATE OF SERVICE

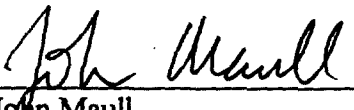
I, John Maull, hereby certify that on this 6th day of May, 1997, I caused to be delivered by first class mail, postage pre-paid, copies of the foregoing "Opposition to Petition for Partial Reconsideration" to the following:

John A. Karousos*
Chief, Allocations Branch
Federal Communications Commission
2000 M Street, N.W.
5th Floor
Washington, D.C. 20554

James L. Primm
President and Counsel
21st Century Radio Ventures, Inc.
530 Wilshire Boulevard, suite 301
Santa Monica, CA 90401
310-393-2741

Richard Zaragoza, Esq.
Kevin M. Walsh, Esq.
Fisher, Wayland Cooper Leader & Zaragoza, L.L.P.
2001 Pennsylvania Avenue, N.W., suite 400
Washington, D.C. 20006
(Attorneys for Emil Macha)

Christopher D. Imlay, Esq.
Cary S. Tepper, Esq.
Booth, Freret, Imlay & Tepper
1233 20th Street, N.W., suite 204
Washington, D.C. 20036
(Attorneys for Albert Benavides)



John Maull

* By hand.